

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

ANTHONY UPSHAW, #217543,	)	
	)	
Petitioner,	)	
	)	CASE NO. 2:04-cv-1125-WKW
v.	)	[wo]
	)	
BILLY MITCHEM, <i>et al.</i>	)	
	)	
Respondents.	)	

**ORDER**

This cause is before the court on the petitioner's Motion for Leave to Proceed on Appeal in Forma Pauperis (Doc. # 45).

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). In making this determination as to good faith, a court must use an objective standard, such as whether the appeal is "frivolous." *Coppedge v. United States*, 369 U.S. 438, 445 (1962). "The statute provides that a court 'may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.'" *Attwood v. Singletary*, 105 F.3d 610, 613 (11th Cir. 1997) (quoting 28 U.S.C. § 1915(d) (1996)).

This circuit has defined a frivolous appeal under section 1915(d) as being one "without arguable merit." *Harris v. Menendez*, 817 F.2d 737, 739 (11th Cir.1987)(quoting *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir.1976)). "Arguable means capable of being convincingly argued." *Moreland v. Wharton*, 899 F.2d 1168, 1170 (11th Cir.1990) (per curiam) (quoting *Menendez*, 817 F.2d at 740 n. 5); see *Clark*, 915 F.2d at 639 ("A lawsuit [under section 1915(d)] is frivolous if the 'plaintiff's realistic chances of ultimate success are slight.'" (quoting *Moreland*, 899 F.2d at 1170)).

*Sun v. Forrester*, 939 F.2d 924, 925 (11th Cir. 1991), *reh'g denied*, 503 U.S. 999 (1992); see also *Weeks v. Jones*, 100 F.3d 124, 127 (11th Cir. 1996) (stating that "[f]actual allegations are frivolous

for purpose of § 1915(d) when they are ‘clearly baseless;’ legal theories are frivolous when they are ‘indisputably meritless’” (citations omitted)).

Applying the foregoing standard, this court is of the opinion that the petitioner’s appeal is without a legal or factual basis and, accordingly, is frivolous and not taken in good faith.

Accordingly, it is ORDERED that the plaintiff’s motion is DENIED. The appeal in this case is certified, pursuant to 28 U.S.C. § 1915(a), as not taken in good faith.

DONE this 9th day of August, 2007.

/s/ W. Keith Watkins  
UNITED STATES DISTRICT JUDGE